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8 IN THE UNITED STATES DISTRICT COURT
9

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11

12 UNITED STATES OF AMERICA,)	No. CR 08-00333 PJH
)	
13 Plaintiff,)	DEFENDANT'S
)	SENTENCING
14 v.)	MEMORANDUM
)	
16 CARLOS CARDENAS-GARCIA,)	
)	Sentencing Hearing Date:
17 Defendant.)	Wednesday, September 3, 2008
18 _____)	at 1:30 p.m.

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23 **Introduction**

24 The sole legal issue in this fast-track Section 1326 sentencing is whether Mr.
25 Cardenas-Garcia is in Criminal History Category III, or in Criminal History Category IV.
26 The parties agree that the defendant should be sentenced at the low end of offense level
27 13 and either Criminal History III or IV: eighteen or twenty-four months, respectively.

28 Because the presentence report incorrectly assigns additional Criminal History
points to the defendant when he was in custody– but not under a “criminal justice
sentence – the correct Criminal History Category is III, and the correct sentence, eighteen
months.

Background

The gravamen of the present dispute is an interpretation of Sentencing Guideline Section 4A1.2(d) and (e). Subsection (d) directs that two additional Criminal History points shall be added if the instant offense took place while the defendant while serving another criminal justice sentence:

Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

USSG § 4A1.1(d) (Nov. 1, 2007) (emphasis in original).

In the present case, the presentence report assigns these additional two points, “as the defendant committed the instant offense while under a criminal justice sentence imposed on January 18, 2008, in case number 2341871 [a January 2008 marijuana conviction]. See *PSR* at 5 ¶ 10.

Subsection (e) adds one or two additional points “if the defendant committed the instant offense less than two years after release from imprisonment. USSG § 4A1.1(e) (Nov. 1, 2007).

The Presentence Report assigns one additional point “as the defendant committed the instant offense less than two years following release from imprisonment in case number 2341871 [a January 2008 marijuana conviction]. See *PSR* at 5 ¶ 10.

Because the Presentence Report misinterprets the guidelines and the chronology of this case, it erroneously assigns these three additional points. Mr. Cardenas-Garcia actually committed the instant offense of being “found in the United States in November 2007, long before the “criminal justice sentence for the state marijuana case was imposed on January 18, 2008.

The November 9, 2007 “found in date is revealed in an e-mail exchange between AUSA Supervisor Gregg Lowder and ICE Special Agent Cesar Lopez. On Cinco de Mayo of this year (ironically) AUSA Supervisor Gregg Lowder solicited new illegal reentry cases from an ICE Agent, writing, “Do you all have any 1326s coming our way?

1 We're looking for more – . *Exh. A, E-Mail of Lowder to ICE Agent Cesar Lopez of May*
 2 *5, 2008.*

3 ICE Special Agent Lopez dutifully responded to this solicitation:

4 Mr. Lowder,

5 Here is a late referral from San Francisco County Jail. **The ICE hold was placed**
 6 **on 11/9/2007.** I have brought this to the attention of my supervisor. Please advise
 7 me at your earliest convenience of your decision. I will be leaving for the rest of
 8 the day to drop of (sic) a file at your office.

9 *Id.* (emphasis added).

10 On November 9, 2007 – when Mr. Cardenas-Garcia was detected by ICE and the
 11 ICE hold was placed – the defendant had not been convicted of the state marijuana
 12 offense referenced in the PSR. *See PSR* at 5 ¶ 8. In November of 2007, Mr. Cardenas-
 13 Garcia was in pretrial custody. Indeed, he was not convicted of any offense for two
 14 additional months, finally pleading guilty to a small sale of marijuana on January 10,
 15 2008. *Id.*

16 To recap, the chronology is as follows:

17 • **November 8, 2007:** Cardenas-Garcia arrested for sale of a \$20 bag of marijuana
 18 and taken to San Francisco County jail. *PSR* at 5 ¶ 8;

19 • **November 9, 2007:** ICE detects Cardenas-Garcia at the San Francisco County
 20 jail and places a hold on the defendant. *Exh. A, E-mail of Agent Cesar to AUSA*
Lowder;

21 • **January 10, 2008:** Mr. Cardenas-Garcia pleads guilty to felony sale of a \$20
 22 bag of marijuana to an undercover officer. *PSR* at 5 ¶ 8;

23 • **May 5, 2008:** AUSA Lowder solicits new 1326 cases from an ICE agent. *Exh.*
 24 *A, E-mail AUSA Lowder to Agent Cesar*;

25 • **May 5, 2008:** Agent Cesar responds and offers the *Cardenas-Garcia* case for
 26
 27
 28

1 federal Section 1326 prosecution. *Id.*¹

2 The legal question is thus whether on November 9, 2007, Mr. Cardenas-Garcia
3 “committed the instant offense (being found in the United States without permission of
4 the Attorney General) “while under any criminal justice sentence. USSG § 4A1.1(d).
5 The defendant did not commit the instant offense while under any criminal justice
6 sentence, because he had not been convicted of the marijuana sale in November of 2007,
7 when he was detected by ICE.

8 Discussion

9 I. The “Instant Offense” of Being “Found In” the United States Ended When 10 Cardenas-Garcia was Detected by ICE on November 9, 2007

11 Mr. Cardenas-Garcia has pleaded guilty to being “found in the United States
12 without have obtained the permission of the Attorney General to re-enter, in violation of
13 Section 1326 of Title 8. That statute provides that any deported alien who “enters,
14 attempts to enter, or is at any time found in, the United States without permission is
15 guilty of a felony. 8 U.S.C. § 1326(a). In the Ninth Circuit, the “found in offense under
16 Section 1326 is a continuous crime – *but the offense terminates upon the defendant’s*
17 *detection. United States v. Hernandez*, 189 F.3d 785, 790 (9th Cir. 1999); *United States v.*
18 *Guzman-Bruno*, 27 F.3d 420, 422-23 (9th Cir. 1994).

19 In *Hernandez*, the Court held that prosecution of a defendant outside of the venue
20 where he was detected “was improper because the defendant *committed and completed*
21 the offense of being ‘found in’ the United States when he was detected by the INS. 189
22

23
24 ¹ There is no explanation for why ICE waited from November 9, 2007 until May 5,
25 2008 to refer this case for illegal reentry prosecution. Indeed, if this case was an “open
26 plea that seven-month delay would be a basis for a downward departure, in light of the
27 lost opportunity to serve concurrent state and federal time. *See United States v.*
28 *Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*). In this jointly-recommended
11(c)(1)(C) plea agreement, however, the defense has waived any right to seek downward
departures.

1 F.3d at 786 (emphasis added). The INS had detected Hernandez in Oregon, but
2 transported him to Eastern Washington where he had an outstanding state warrant for
3 cocaine possession. *Id.* at 787. After serving a prison sentence for the cocaine charges,
4 the defendant was prosecuted in Eastern Washington for the Section 1326 offense, where
5 he challenged venue. *Id.*

6 The government in *Hernandez* argued that because Section 1326 is a continuous
7 offense, “the defendant’s presence in a judicial district, for any reason, constitutes a
8 violation of Section 1326. *Id.* at 788. The Court rejected this argument, holding that “it
9 is a crime for a deported alien to remain in the United States until he is ‘found’ by the
10 authorities. The INS’s act of discovering or finding the defendant completes the
11 offense. *Id.* at 790.

12 The Court in *Hernandez* relied in part on *Guzman-Bruno* for the proposition that
13 INS’s discovery of the defendant terminates the offense. *Id.* at 789. Specifically, the cited
14 portion of *Guzman-Bruno* states that “[a] violation of 8 U.S.C. § 1326 for being found in
15 the United States after a prior deportation is a continuing offense which continues so long
16 as the alien remains in the country. 27 F.3d at 422-23 (internal citation omitted).

17 Although *Hernandez* is a venue case, its holding controls the present inquiry – for
18 the Ninth expressly relied upon statute of limitation and guideline inquiries in its analysis.
19 In *Hernandez*, the Court expressly relied on other circuit’s reasoning in determining
20 “when a defendant completed the offense of being ‘found in’ the United States, for
21 purposes of the statute of limitations or the Sentencing Guidelines. *Id.* (emphasis in
22 original) (citing *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) for
23 the proposition that “a ‘found in’ violation is a continuing violation until the date the alien
24 is discovered by immigration authorities; *United States v. Rivera-Ventura*, 72 F.3d 277,
25 282 (2d Cir. 1995) for the proposition that a § 1326 offense “is not complete until the
26 authorities . . . discover the illegal alien in the United States; *United States v. Gomez*, 38
27 F.3d 1031, 1035 (8th Cir. 1994) for the proposition that “a ‘found in’ violation is a
28 continuing violation that is not complete until the alien is ‘discovered by immigration

authorities). The Ninth Circuit reasoned that “[b]y articulating the act that triggers *when* a § 1326 violation is committed - *the alien’s discovery by immigration authorities* - these cases also provide a limit on *where* venue may lie. *Hernandez*, 189 F.3d at 790 (second italics added; first and third italics in original).

The reasoning of *Hernandez*, as well as of the out-of-circuit cases upon which it relies, is logical: Once an individual enters custody and ICE places a detainer on him or her, his or her illegal presence in the United States is no longer voluntary. One should not be subject to prosecution for a crime he or she is committing against his or her will. *Hernandez* makes clear that Mr. Cardenas-Garcia’s commission of the present offense terminated when he was detected by ICE on November 9, 2007 and an ICE hold was lodged. Cardenas-Garcia did not continue to commit the instant offense through January 10, 2008, the date his sentence for the state marijuana offense was imposed.

Because the “instant offense” was completed on November 9, 2007 – when the defendant was detected – and because Cardenas-Garcia was not serving a criminal justice sentence on that date, it is incorrect to assign him two additional criminal history points for serving a criminal justice sentence under Guideline Section 4A1.1(d). Moreover, it is incorrect to assign the defendant the additional point under Section 4A1.1(e), because on November 9, 2007 he did not “commit the instant offense” “while in imprisonment” for the marijuana case.

II. Mr. Cardenas-Garcia’s Pretrial Detention After His November 2007 Arrest Does Not Constitute a “Criminal Justice Sentence” or a “Term of Imprisonment”

The plain language of the Guidelines reveals that Mr. Cardenas-Garcia is not subject to sentencing enhancements under § 4A1.1(d) or (e). These Guidelines instruct:

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence [of at least sixty

days] or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

USSG § 4A1.1(d),(e) (Nov. 1, 2007).

The commentary to this guideline lists the various situations that count as a “criminal justice sentence – including “probation, parole, supervised release, imprisonment, work release, or escape status. *See* USSG § 4A1.1 comment. n.4. Conspicuously (and logically) absent from this list is *pretrial* detention. This makes sense, for before a conviction a defendant is constitutionally presumed to be innocent. On November 9, 2007, Mr. Cardenas-Garcia was presumed innocent of any marijuana sale charges: he was being held on pretrial detention on the marijuana charge, and had an ICE hold preventing his release. A guideline that increased the criminal history *merely for an arrest* (which is what the PSR urges in the present case) would seriously infringe upon the constitutional presumption of innocence.

Guideline 4A.1 does not add additional points under either subsection (d) or (e) for being detected by ICE after being *arrested* for another offense; the PSR and the government err when they claim it does.

Moreover, the term “criminal justice sentence” is defined in the commentary to the guideline as “a sentence countable under § 4A1.2. USSG § 4A1.1(d) cmt. n.4. Turning to Guideline § 4A1.2, there is an extensive guide for determining what constitutes a “criminal justice sentence. Post-arrest, pretrial custody is *not* listed. *See* USSG § 4A1.2.

Similarly, the commentary to § 4A1.1(e) states: “Two points are added if the defendant committed any part of the instant offense . . . less than two years following release from confinement on a sentence counted under § 4A1.1 (a) or (b). USSG § 4A1.1(e) cmt. n.5. Sections 4A1.1(a) and (b) adopt the same definition of “sentence, but assign different enhancements based on the length of time served. *See* USSG §§ 4A1.1 (a), (b). Both provisions define “sentence” according to USSG § 4A1.2(b), which states that a sentence “means a sentence of incarceration and refers to the maximum sentence imposed. “Sentence” does not mean post-arrest, pretrial custody.

1 It also bears emphasis that the application notes to § 4A1.2(b) state that “[t]o
2 qualify as a sentence of imprisonment, the defendant must have actually served a period
3 of imprisonment on such sentence. USSG § 4A1.2, cmt. n.2. The Sentencing
4 Commission’s choice of the language “must *have* actually served demonstrates that a
5 qualifying sentence need to have occurred in the past.

6 The language of all of these Guidelines provisions – §§ 4A.1(d), 4A.1(e),
7 4A1.2(a), and 4A1.2(b) – reveals that Mr. Cardenas-Garcia is not subject to enhancement
8 under §§ 4A1.1(d) or (e), because when he was detected by ICE on November 9, 2007 he
9 was not serving a “criminal justice sentence.

10 Authority from several federal circuits confirms Mr. Cardenas-Garcia’s reading of
11 the Guidelines. In *United States v. Latimer*, 991 F.2d 1509, 1517 (9th Cir. 1993), the
12 Court rejected the notion that pretrial or pre-parole hearing detention was “incarceration
13 simply because a defendant is “physically confined between the walls of a . . . prison.
14 The defendant in *Latimer* had been arrested for parole violations, and spent ninety days in
15 custody awaiting his parole hearing. *Id.* The Court framed this time as “entirely
16 administrative in nature, because it was due to a *suspicion* that he had violated his
17 parole, rather than an adjudication of guilt. *Id.* As such, “when the reason behind a
18 period of incarceration is administrative necessity, rather than an adjudication of guilt,
19 this period of incarceration says nothing about the defendant’s culpability. Accordingly,
20 it may not provide a basis for sentence enhancement. *Id.*

21 To further support its conclusion, the Ninth Circuit noted that a defendant’s
22 detention while awaiting a parole hearing is “analogous to pre-trial custody. *Id.*
23 Although the Court did not further elaborate on this analogy, its reasoning is clear: The
24 conclusion that a defendant’s custody pending his parole hearing does not constitute
25 “incarceration as defined by the Guidelines stems from the fact that pretrial custody
26 likewise is not “incarceration. Like the defendant in *Latimer*, Mr. Cardenas-Garcia’s
27 pretrial arrest was purely administrative. No court had found him guilty of the marijuana
28 offense for which he had been arrested. Therefore, pursuant to *Latimer*, his time spent in

1 pretrial custody may not provide a basis for sentence enhancement under Guideline
2 Section 4A1.1.

3 The Fourth Circuit has also expressly held that pretrial confinement does not
4 constitute a sentence of imprisonment. In *United States v. Stewart*, 49 F.3d 121, 122-23
5 (4th Cir. 1995), the Court held that the defendant's detention while awaiting a parole
6 violation hearing did not amount to a sentence of imprisonment under the Sentencing
7 Guidelines. In *Stewart*, the defendant had been arrested for violating the terms of his
8 state parole, and he served twenty-four days in custody while awaiting his hearing. *Id.* at
9 122. Although the state court found the defendant guilty of violating his parole, it did not
10 revoke his parole or reimpose a sentence. *Id.* Still, the district court found that the
11 defendant's detention served as an extension of a prior sentence, and met the recency
12 requirement of § 4A1.1(e). *Id.* at 121. The Fourth Circuit vacated the sentence, holding
13 that "there exists no basis for a holding that a detention awaiting the commencement of a
14 parole revocation hearing amounts to an extension of an original 'imprisonment on a
15 sentence' within the meaning of the Sentencing Guidelines. *Id.* at 122-23.

16 *Latimer* and *Stewart* are directly analogous to Mr. Cardenas-Garcia's case. In
17 *Stewart*, the Court astutely observed that a reading of § 4A1.1(e) to allow the defendant's
18 pre-hearing detention to qualify as a sentence of imprisonment

19 would lead to absurd results. . . . [A]n individual who had been arrested on
20 a parole violation warrant less than two years prior to the commission of an
21 instant offense, but found not to have been in violation of his parole and
22 released, would still be assessed criminal history points under USSG §
23 4A1.1(e) merely because he had been detained at the same time that he was
24 on parole and only so that a hearing might be held.

25 *Id.* at 124. The Court in *Latimer* similarly noted that "[t]he consequences of counting
26 pre-revocation custody as incarceration would be unthinkable: defendants would have
27 their sentences enhanced even if it were later determined at their hearings that they had
28 not violated parole. *Latimer*, 991 F.2d at 1517.

Similarly, were this Court to accept the PSR's interpretation of the Guidelines, Mr.

1 Cardenas-Garcia would face a sentence enhancement under § 4A1.1(d) and (e) even if he
2 had been *acquitted* of the marijuana charges at the San Francisco Hall of Justice. The
3 Sentencing Commission surely did not contemplate such a bizarre result.

4 When Mr. Cardenas-Garcia was sentenced for the state marijuana offense – two
5 months *after* the commission of the instant Section 1326 offense – he was credited for the
6 time he served in custody following his November 8, 2007 arrest. This fact is of no
7 import. A court’s decision to give a defendant credit for time served does not, *nunc pro*
8 *tunc*, place the date of sentencing two months into the past.

9 To allow for such an interpretation would yield anomalous results. A sentencing
10 court’s decision to credit a defendant with time served represents the court’s recognition
11 that the nature of the offense and the characteristics of the defendant allow for a shorter
12 custodial punishment. A sentencing court is not required to give a defendant credit for
13 time served, but does so as an exercise of leniency. As such, the more serious the
14 offense, the less likely the sentencing court is to credit the defendant with time served.
15 Had the court in Mr. Cardenas-Garcia’s case declined to credit him with time served – an
16 indication that the judge found his offense to be more serious and more deserving of
17 punishment – the Government would have no argument that he meets the requirements
18 for enhancement under USSG § 4A1.1(d) or (e). A reading of the Guidelines that allows
19 for this counterintuitive result is absurd, and is contrary to the Guidelines’ stated purpose
20 to “assure the ends of justice. USSG MANUAL, ch. 1, pt. A1.

21 Although the Ninth Circuit has not expressly addressed the question of whether a
22 post-offense sentencing, which credits the defendant for time served prior to the instant
23 offense, would make a defendant eligible for enhancement under § 4A1.1(d) and (e),
24 other circuit courts have examined the issue. In *United States v. Staples*, 202 F. 3d 992,
25 997-98 (7th Cir. 2000), the Court analyzed whether credit for time served on a separate
26 charge constituted a “sentence of imprisonment” under USSG § 4A1.2. The defendant in
27 *Staples* had served a 250-day jail sentence for violating his probation, and was given full
28 credit for 250 days served on a subsequent conviction for driving with a suspended

1 license. *Id.* at 997. Recognizing that the sentencing court had applied credit for time
 2 served on one offense to an entirely separate offense, the Court affirmed the conviction.
 3 *Id.* at 998. However, the *Staples* Court aptly noted: “Had *Staples been held without bail*
 4 *while awaiting trial*, that time could not be counted as a sentence of imprisonment, but
 5 being given credit for time served on another offense is a different story. *Id.* at 997-98
 6 (emphasis added).

7 The Court’s analysis in *Staples* supports the defense position that the time Mr.
 8 Cardenas-Garcia spent being “held without bail while awaiting trial” cannot be counted as
 9 a sentence under USSG § 4A1.1(d) or (e).

10 An expert at the United States Sentencing Commission has confirmed Mr.
 11 Cardenas-Garcia’s position that enhancements under §§ 4A1.1(d) and (e) would be
 12 improper. Alan Dorhoffer, an attorney who serves as Deputy Director of the Sentencing
 13 Commission’s Office of Education and Sentencing Practice, stated that – assuming the
 14 commission of a § 1326 offense terminates upon detection – application of additional
 15 criminal history points would be improper under § 4A1.1(d) because a mere arrest does
 16 not constitute a “criminal justice sentence. *Telephone interview by Abby Sullivan with*
 17 *Alan Dorhoffer, Deputy Director, U.S. Sentencing Comm’n Office of Educ. & Sentencing*
 18 *Practice* (Aug. 8, 2008). Mr. Dorhoffer stated that an additional point under § 4A1.1(e)
 19 would likewise be improper, because such an enhancement presumes that the time Mr.
 20 Cardenas-Garcia spent in custody following his arrest in the state marijuana case
 21 constituted “confinement on a sentence. *Id.* Mr. Dorhoffer unequivocally stated (and
 22 common knowledge dictates) that time served in custody following an arrest but prior to
 23 any adjudication of guilt by a criminal court does not constitute a criminal justice
 24 sentence, regardless of whether the defendant is later credited for that time. *Id.*

25 **III. The Government’s Arguments in Support of the Presentence Report’s** 26 **Position are Unpersuasive**

27 It is anticipated that the government will offer two primary arguments in support of
 28 the PSR’s assignment of these three additional criminal history points (and placement in

1 Criminal History Category IV). First, the government will argue that Mr. Cardenas-Garcia
2 pleaded guilty to being found on May 5, 2008 (the date charged in the indictment) –
3 therefore, that is the effective date for the USSG § 4A1.1(d) and (e) analysis. Second, the
4 government will presumably rely on an Eleventh Circuit case, *United States v. Coeur*, 196
5 F.3d 1344 (11th Cir. 1999), in support of the argument that these three criminal history
6 points should count. Neither argument is persuasive.

7 First, the date charged in the indictment and admitted in the plea colloquy is not
8 relevant to this guideline question. The parties cannot, by alleging or admitting a
9 particular date of detection, change controlling Ninth Circuit authority on when a Section
10 1326 offense ends. In the Ninth Circuit, Section 1326 offenses end upon detection – and
11 in this case, it ended on November 9, 2007, when an ICE hold was lodged. *See*
12 *Hernandez*, 189 F.3d at 790.

13 Moreover, one can fairly ask what Mr. Cardenas-Garcia was to do? Go to trial and
14 “defend his case by arguing that he was actually first detected by ICE on November 9,
15 2007 – and not on May 5, 2008? The fact that the government chose to allege a late date
16 in the indictment is no defense to the charges, and would not be the basis for a valid
17 defense at trial or a motion to strike surplusage.

18 It is the government – not the defense – which controls the date of detection
19 alleged in the indictment. It would be a particularly unjust result if the government could
20 manipulate the detection date alleged in the indictment in order to try to capture more
21 criminal history points.² That is particularly true in the present case when the late
22 detection date in the indictment reflects a *seven month delay* by ICE in referring the case
23 for prosecution. The Court should not reward significant ICE delays by adopting a made-
24 up May “detection date that is presented to the grand jury.

25
26
27 ² To be clear, there is no indication in the present case that AUSA Frick
28 deliberately alleged the May 2008 date – instead of the November 2007 date – in order to
increase the criminal history points.

1 Finally, the position of the government and Probation is flatly inconsistent with the
2 detection date urged in other illegal reentry cases. In Mr. Cardenas-Garcia's case, the
3 "late (May 2008) detection date would increase his sentence because it would sweep in
4 the January 2008 marijuana conviction.

5 In other illegal reentry cases, however, Probation and the government argue for the
6 *earliest reported* ICE detection or illegal reentry date – a date that is often far earlier than
7 the official detection date alleged in the indictment and admitted during the plea. In other
8 cases, Probation and the government have urged this earlier detection date in order to get
9 within two years of a prior custodial sentence, which increases the criminal history points
10 under Section 4A1.1(e).

11 It is an odd rule indeed which allows Probation to select whichever "detection
12 date that happens to generate the most criminal history points. The Court should reject
13 May 2008 as the determinative date in this case, because that date actually has no relation
14 to the factual, actual detection date of the defendant.

15 The government's anticipated reliance on the Eleventh Circuit's decision in *Coeur*
16 is equally unpersuasive. *United States v. Coeur*, 196 F.3d 1344 (11th Cir. 1999). In
17 *Coeur*, the illegal reentry defendant was found by the INS in the United States "while he
18 was serving another sentence. *Id.* at 1345. The Eleventh Circuit held that the district
19 court properly applied Section 4A1.1(d) of the guidelines. *Id.*

20 In *Coeur*, however, the INS detected the defendant "*while he was serving another*
21 *criminal justice sentence.*" *Id.* (emphasis added). The INS in *Coeur* had not detected the
22 defendant during post-arrest, pretrial custody on another criminal justice sentence – as is
23 true in the present case. *Coeur* thus adds nothing to the analysis of the present issue
24 before this Court.

25 Notably, in the *Coeur* decision the government argued exactly the opposite what
26 the government is now arguing before this Court. In this Eleventh Circuit decision, the
27 government expressly argued that the crime of being "found in was completed *on*
28 *discovery*:

1 The government counters that because Coeur entered a plea of guilty for being
2 “found in the United States, *a crime which was not completed until the INS*
3 *discovered him*, the date of his re-entry is irrelevant and an enhancement under §
4 4A1.1(d) was proper because he was actually under a criminal justice sentence
when he was found by the INS.

5 *Id.* (emphases added). The government in *Coeur* was right; the government here, wrong:
6 the “found in crime under Section 1326 ends when immigration agents detect the alien.
7 In the present case, that date was November 7, 2007 – long before the conviction for
8 which additional criminal history points are being credited in the PSR.

9 **Conclusion**

10 For the foregoing reasons, Mr. Cardenas-Garcia respectfully requests that the
11 Court direct that the PSR be correct, that it find the defendant to be in Criminal History
12 Category III, and that it impose a sentence of eighteen months of custody.

13
14 Dated: August 20, 2008

15 Respectfully submitted,

16 BARRY J. PORTMAN
17 Federal Public Defender

18 /s

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20 STEVEN G. KALAR
21 Assistant Federal Public Defender
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EXHIBIT A

1326s?

Page 2 of 2

Gregg

From: Lopez, Cesar J [mailto:Cesar.Lopez@associates.dhs.gov]
Sent: Monday, May 05, 2008 2:13 PM
To: Lowder, Gregg (USACAN)
Cc: Waldinger, Kyle (USACAN)
Subject: RE: CARDENAS/A79 380 421

Mr. Lowder,

Here is a late referral from San Francisco County Jail. The ICE hold was placed on 11/9/2007. I have brought this to the attention of my supervisor. Please advise me at your earliest convenience of your decision. I will be leaving for the rest of the day to drop of a file at your office.

Thanks,

Cesar

From: Lowder, Gregg (USACAN) [mailto:Gregg.Lowder@usdoj.gov]
Sent: Monday, May 05, 2008 1:42 PM
To: Lopez, Cesar J; Kaiser, Polly E
Cc: Waldinger, Kyle (USACAN)
Subject: 1326s?

Do you all have any 1326s coming our way? We're looking for more -

THANKS,

Gregg

Gregg W. Lowder

Assistant U.S. Attorney

450 Golden Gate Avenue, 11th Floor

San Francisco, Ca 94102

(415) 436-7044

5/6/2008